

No. 7493.

In the United States
Circuit Court of Appeals

For the Ninth Circuit. 17

Rex B. Goodcell, Former Collector of
Internal Revenue for the Sixth Col-
lection District of California,

Appellant,

vs.

The St. Helens Petroleum Company,
Ltd., a corporation,

Appellee.

BRIEF FOR THE APPELLEE.

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BRIEF FOR THE APPELLEE.

OPINION BELOW.

The opinion of the court below, the District Court of the United States for the Southern District of California, which is unreported, is set forth on pages 40-41 of the Transcript of Record.

JURISDICTION.

This appeal involves income and profits taxes for the fiscal year ended May 31, 1922, and is taken from a judgment of the District Court entered in favor of the taxpayer on November 17, 1933. [R. 26-27, 32.] The appeal is brought to this Court by petition for appeal filed by appellant on February 16, 1934 [R. 81], pursuant to Section 128(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

1. The Commissioner of Internal Revenue was required to determine, and did determine profits tax rates of appellee, as a foreign corporation, by comparison with the rates paid by representative domestic corporations. Appellant concedes, and the trial court has found, that the Commissioner erroneously overstated appellee's taxable net income because of the disallowance of certain deductions to which it was entitled. The trial court redetermined appellee's profits taxes by applying to the corrected taxable net income the rates previously determined by Commissioner and redetermined the income tax by applying to the corrected net income the rate fixed by law. Was the Court without jurisdiction to change the amount of either the profits taxes or the income tax as determined by the Commissioner?

2. During the taxable year ended May 31, 1922, the appellee paid to Great Britain certain income taxes upon its profits and subsequently deducted a corresponding amount from dividends paid by it to its stockholders during said year. Were such taxes deductible from its gross

income for said taxable year? The fundamental question is whether said taxes were imposed by Great Britain upon the corporation's income or upon the dividends paid to its stockholders.

STATUTES INVOLVED.

The applicable provisions of the Federal and British statutes will be found in the appendix attached to the brief filed in Docket No. 7488.

STATEMENT OF FACTS.

All the facts were stipulated. [R. 31-39, 42-64.] The appellee is a corporation organized under the laws of Great Britain having its principal office and place of business in Los Angeles, California. [R. 31.] During the fiscal year ended May 31, 1922, it accrued and paid to the Government of Great Britain an income tax in an amount, converted into United States currency, of \$73,804.61. [R. 34.] During the same fiscal year its income from sources within the United States was 92.76 per cent of its total net income from all sources. [R. 34.] Appellee deducted from the dividends paid by it to its stockholders during said fiscal year an amount of at least \$68,461.16, on account of said British taxes. [R. 34.] The parties hereto stipulated and agreed that if the plaintiff is entitled to a deduction, in determining its taxable net income, of income taxes so accrued and paid to Great Britain, the amount of said deduction for the fiscal year ended May 31, 1922, is \$68,461.16. [R. 34.] The Commissioner of Internal Revenue allowed no deduction on account of

said British income taxes for the fiscal year ended May 31, 1922. [R. 34-35.]

In its tax returns for the fiscal year ended May 31, 1922, appellee reported total taxes in the amount of \$39,046.17, which was duly assessed and paid to the appellant as Collector of Internal Revenue. [R. 32.] Upon an audit of the returns, the Commissioner of Internal Revenue determined a deficiency in tax for said year of \$2,166.21. [R. 61-62.] In determining said deficiency, the Commissioner redetermined appellee's profits tax liability for the first seven months of said fiscal year under the provisions of Section 328, Revenue Act of 1921. [R. 47, 62.] Said deficiency was duly assessed with interest of \$819.14 and paid by appellee to Galen H. Welch, Collector of Internal Revenue, on March 11, 1929. [R. 32-33.]

Within the period and in the manner provided by law, appellee filed with the Commissioner of Internal Revenue claims for refund, setting forth therein the same grounds alleged in its Complaint in the present proceeding. [R. 6-10, 13-14, 33, 74.] The Commissioner of Internal Revenue either failed to take any action with respect to said claims for refund or rejected same and after a lapse of more than six months, appellee filed its complaint in the present proceeding. [R. 11, 33-34.]

By stipulation a jury was waived and the case was tried by the Court without the intervention of a jury. [R. 30, 70.] The parties filed with the Court a stipulation of

facts, in which appellant stipulated that appellee was entitled to a further deduction for depreciation on wells in the amount of \$12,022.93, for the fiscal year ended May 31, 1922. [R. 34.] The parties left for determination by the Court the question of deductibility of the British income taxes. [R. 34.] At the close of all the evidence, counsel for each party moved for judgment on the record. [R. 39.] On September 21, 1933, the Court, by minute order ordered judgment in favor of appellee. [R. 40-41.] Pursuant to order of the Court on motion to reopen the case for additional evidence, a stipulation of additional facts was filed on November 6, 1933. [R. 42-64.] Thereafter on November 17, 1933, appellant filed a motion in arrest of judgment, which was denied by the Court. [R. 64-67.] Appellant filed requests for special findings of fact and conclusions of law, which were rejected by the Court. [R. 67-69, 75.] The Court accepted and adopted the findings and conclusions of law requested by appellee. [R. 70-75.] The Court determined that the Commissioner had erred in refusing to allow to appellee deductions from income for the fiscal year ended May 31, 1922, in the amount of \$12,022.93 for further depletion on wells; and in the amount of \$68,461.16 for British income taxes, and in levying tax assessments on the basis of net income computed without the allowance of said deductions. [R. 74.] On this basis, the Court rendered judgment for the appellee for \$11,451.60, with interest as provided by law. [R. 26-27.] From this judgment for appellee, the appellant has appealed. [R. 81.]

PRELIMINARY STATEMENT.

At the trial below, six associated cases were consolidated for trial, all being suits against present or former collectors of internal revenue for income or income and profits taxes alleged to have been erroneously collected. In each of these cases, judgment was entered by the Court in favor of the taxpayer, and all, upon appeal, have been set for argument together before this Court. Following is a list of these cases, showing the Docket No. in this Court, the names of the parties, and the fiscal year involved.

Docket No.	Taxpayer (Appellee)	Collector (Appellant)	Fiscal Year Ended May 31
7488	The St. Helens Petroleum Co., Ltd.	Galen H. Welch	1921
7490	“ “ “ “ “	“ “ “	1922
7493	“ “ “ “ “	Rex B. Goodcell	1922
7491	The Kern River Oilfields of Cal., Ltd.	“ “ “	1923
7492	“ “ “ “ “	“ “ “	1924
7489	“ “ “ “ “	“ “ “	1925

Dockets 7490 and 7493 involved the same taxpayer, the same taxable year, and the same issues, with separate suits being brought and separate judgments being rendered against two successive collectors of internal revenue because a part of the tax in controversy was paid to each of them.

The issue involving the deductibility of British income taxes is involved in *all* of these cases and was the only issue presented by the parties at the trial below, the other issues raised by the pleadings having been conceded by appellants in the stipulations filed at the trial [R. 41.]

The other issue, involved only in Docket Nos. 7488, 7490, and 7493, is the jurisdiction of the trial court to enter judgment in any case where the profits taxes have

been determined under Section 328, Revenue Acts of 1918 and 1921. As Congress did not impose any profits tax for any period after December 31, 1921, this issue naturally is not presented in Docket Nos. 7489, 7491 and 7492.

Appellants have presented their full arguments on both issues in the brief filed in Docket No. 7488, and have merely referred to said brief in the briefs presented in all other cases. As a matter of convenience and to avoid confusion, the same procedure is being followed by appellees. Accordingly the full statement of argument on both issues will be presented in the brief filed under Docket No. 7488.

SUMMARY OF ARGUMENT.

Issue I. The Court below did not err in denying appellant's motion in arrest of judgment. Neither in the pleadings nor at the trial of the case was any issue raised as to jurisdiction of the Court or as to the propriety of the Court redetermining the profits tax on the basis of the rates previously determined by the Commissioner. Appellant conceded at the trial that the taxable net income of appellee had been overstated in the amount of \$12,022.93 because of insufficient allowance for depreciation deductions, and submitted to the Court for determination the propriety of an additional deduction of \$68,461.16 for taxes, which issue was decided by the Court in favor of appellant. In the absence of any allegation or proof to the contrary, the Court was justified in applying to the correct net income the profits tax rates previously determined by the Commissioner. The Court has not attempted to override the discretionary powers of the Commissioner.

None of the authorities cited by appellant support his position and, on the contrary, the Supreme Court has in three cases affirmed, either in whole or in part, decisions of lower courts allowing refunds to taxpayers whose profits taxes had been determined under "special assessment."

Congress has not given the Commissioner unreviewable discretion where errors were admittedly made in the determination of net income, even though the profits taxes are computed under Section 328. This is particularly so in the case of foreign corporations to whose returns "special assessment" was required by law and not granted as a matter of relief.

Even if the Commissioner's computation of the *profits tax* was not subject to review by the Court, such inhibition would not apply to the redetermination of the *income tax*, where the exact rate was provided in the law and was not a matter of discretion.

Under appellant's construction, the law would be of doubtful constitutionality. Since appellee's profits taxes had to be determined under "special assessment," it would follow under appellant's contentions that it could *never* obtain a judicial review of the Commissioner's determination of either its income or its profits tax, no matter how arbitrary or erroneous the basis. This would not only violate the due process clause of the Constitution, but would also amount to a delegation of legislative and judicial functions to the executive branch. The interpretation of the law adopted by the Court below avoids these constitutional difficulties and carries out the clear intention of Congress to provide a complete system of judicial review to taxpayers.

It should be noted that no profits taxes were determined by the Commissioner for the last five months of the fiscal year in question. [R. 62.] Accordingly, there can in no event be any question of discretion or jurisdiction with respect to the income tax assessed and paid for that portion of the fiscal year.

Issue II. Under the Federal Revenue Act of 1921, the deduction for taxes (including income taxes paid to a foreign Government) is allowable to the one on whom the taxes were imposed and by whom they were paid. It has been stipulated and found by the Court that the British income tax of \$68,461.16, in issue here, was paid to the British Government by the appellee. [R. 34.] It is clear that, under British law, this tax was imposed on appellee, was determined on the basis of its net income, and was payable in any event, even though no dividends might ever be declared to its shareholders.

There is no British income tax on dividends as such. In paying the British income tax, appellee did so as a taxpayer and not as an agent for its shareholders. The mere fact that it was permitted, though not required, under the British practice, to deduct from dividends paid, if any, a proportionate amount of the tax, does not change the fact that it paid the taxes on its own behalf as a taxpayer. Such deductions from dividends did not result in any reimbursement to appellee of its own income tax payment; having paid the tax, its income available for dividends was merely the lesser sum.

To speak of the payment of the income tax by appellee as a "withholding" is simply a misnomer contrary to facts. It was required to pay the tax to the British Government on *its* entire net income even though (1) it made no payment whatever to its stockholders and (2) the stockholders had no income from this or any other source.

The construction contended for by appellant would result in confusion in the administration of our tax laws and often would result in an unfair and unjust duplication of deductions, defeating the collection of tax revenues.

The statute is plain and unambiguous, leaving no need for departmental construction. There has been no uniform and long continued rule of construction by the courts, the Board or the Treasury Department. The informal Bureau rulings relied upon by appellant "have none of the force or effect of Treasury decisions and do not commit the Department to any interpretation of the law." As a matter of fact, the Bureau's views on this question have changed from time to time. At the present time the Department is contending in various cases before the Board precisely in accordance with appellee's contentions herein.

ARGUMENT.

The detailed argument of appellee on both questions is set forth in the brief filed for appellee in the case of *Welch v. St. Helens Petroleum Co., Ltd.*, No. 7488, now pending before this Court, which is included herein by reference.

CONCLUSION.

Appellee submits that for the reasons set forth above the Court below properly assumed jurisdiction of the subject-matter and properly held that appellee was entitled to a deduction of \$68,461.16 on its return for the fiscal year ended May 31, 1922, on account of income taxes paid during said year to the Government of Great Britain.

Respectfully submitted,

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